Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

MARILYN ZIEMKE, CELIA SHAR, and
ISRAEL TRAVEL ADVISORY SERVICE, INC.,

Petitioners,

v.

SHALOM ALMOG, IRIT ALMOG,
and BEN AMI GELLER,

Respondents.

**On Petition For A Writ Of Certiorari
To The Superior Court Of New Jersey,
Appellate Division**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Can a State make the deterrence of defamatory speech an overriding government interest without running afoul of the free speech guarantee of the First Amendment?

1-A. Can a New Jersey court, consistent with the First Amendment, impose millions of dollars in punitive damages on two of its individual citizens, resulting in a loss of their home, business, life savings, and all of their assets, because of defamatory speech uttered by them?

1-B. If New Jersey has a legitimate government interest in deterring defamatory speech, is that deterrence interest so strong that it outweighs the interest of a foreign country in determining how its citizens should be compensated?

II. Does the Due Process Clause of the Fourteenth Amendment prohibit a State from imposing a multi-million dollar punitive damage verdict rendered by an "advisory" jury when that verdict was "elevated" on appeal without having been subject to any review at either the trial or appellate level, and when the jury did not consider each Defendant individually when rendering its punitive verdicts?

III. Is a 5.5 million dollar punitive damage verdict imposed against two individual women, whose combined assets total 3 million dollars, excessive in violation of the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Israel Rodrigue, a citizen of the State of Israel, and Abir Travel and Tours, Ltd., a corporation organized and existing under the laws of the State of Israel, were parties to the original proceeding in the trial court. Both were defaulted and no action was ever taken against them by either plaintiff or the cross-claimant.

There are no parent or subsidiary companies to be listed.

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The opinion of the New Jersey Superior Court, Appellate Division, is published at 298 N.J. Super. 145, 689 A.2d 158 (N.J. Super. Ct. App. Div. 1997). The New Jersey Supreme Court's order granting Defendants' petition for a writ of certiorari is not published. The New Jersey Supreme Court's order holding that certiorari was improvidently granted and dismissing the appeal is published at 152 N.J. 361, 704 A.2d 1297 (1998). The New Jersey Supreme Court's order denying reconsideration is not published. The opinions and orders entered by the trial court are not published. All relevant opinions and orders are included in the attached Appendix.

JURISDICTION

After a jury trial, judgment for over $2,000,000 was entered on October 8, 1993, (App. 37- 43), pursuant to a bench verdict rendered by the trial judge. The jury's $7,000,000 verdict was denominated "advisory." (App. 18-21.) A timely filed new trial motion was denied. (App. 22-23.)

On appeal, on February 25, 1997, the Superior Court of New Jersey, Appellate Division, vacated the bench verdict and "elevated" the seven-million dollar "advisory" jury verdict to the final judgment in the case. (App. 1-17.) An amended judgment was entered in conformance with this opinion on March 11, 1997. (App. 30-36.)

Defendants timely sought a writ of certiorari from the New Jersey Supreme Court, which was granted. (App. 24-25.) On January 21, 1998, the New Jersey Supreme Court, after full briefing and oral argument, dismissed Defendants' appeal, determining that certiorari was improvidently granted. (App.26-27.) The New Jersey Supreme Court denied Defendants' timely filed motion to reconsider on February 24,

1998. (App. 28-29.) This Petition has been timely filed, within 90 days of February 24, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this petition are the Free Speech Clause of the First Amendment and the Due Process Clause of Section 1 of the Fourteenth Amendment.

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. § XIV, § 1.

STATEMENT OF THE CASE [1]

Plaintiffs, Shalom Almog ("Almog"), his wife, Irit Almog ("Ms. Almog"), and Cross-claimant, Ben Ami Geller ("Geller"), are all Israeli citizens residing in Israel. They filed suit in Essex County alleging various claims against Ms. Celia Shar ("Ms. Shar") and Ms. Marilyn Ziemke ("Ms. Ziemke"), a mother and daughter, now ages 82 and 65, respectively, who operate a small travel agency, Israel Travel Advisory Service, Inc. ("ITAS"), out of their home in Livingston, New Jersey.

Almog used to work, in Israel, for various Israeli land tour operators that made ground arrangements in Israel for ITAS tourists. Geller was an Israeli tour guide for ITAS.

In October, 1988, Geller traveled from Israel to New Jersey to meet with Shar and Ziemke to report a very serious matter: Almog was embezzling money from ITAS. Geller substantiated this claim with documentation. (Tr. 8/9/93 at 118-119.) After hearing this news, Ms. Shar and Ms. Ziemke consulted with an Israeli attorney about filing a lawsuit in Israel against Almog to recover the stolen funds. (Tr. 8/4/93 at 42.) Before filing the lawsuit, however, Israeli law required substantiation from an independent accountant. As alleged in the Israeli Complaint filed by Defendants in Israel, the accounting firm confirmed that Almog had misappropriated large sums of money from ITAS. (Da 49-58.)

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[1] For the purposes of this Petition, citations to the record below will be in the following form: "DA #" refers to a page in the Defendants' Appendix filed in the Superior Court; "Tr. #" refers to a page of the transcript of the proceedings; "PX #" refers to a Plaintiff's trial exhibit; and "DX #" refers to a Defendants' trial exhibit. Citations to a page of the Appendix attached to this Petition will be in the form "App. #."

When Almog learned of ITAS' investigation by the Israeli accountant and ITAS' intention to sue him in Israel, he preemptively filed this lawsuit. (Da 1-48.) The suit was filed in New Jersey because, as Plaintiffs' attorney stated at trial, the Almogs "don't have a cause of action for defamation in Israel, and they do in the United States." (Tr. 7/14/93 at 18.) Almog claimed that Defendants defamed him by telling approximately 17 people in the tourist industry (14 of whom were located in Israel) of Almog's embezzlement. (Da 1-48.) While Ms. Almog did not claim she was defamed, she sought damages for loss of consortium because she was separated from her husband when he relocated to the Caribbean to manage a gold jewelry factory. (*Id.*; 7/19/93 at 135-136.) The Almogs also sued Geller for defamation because he initially told Ms. Shar and Ms. Ziemke about Mr. Almog's theft of ITAS' funds. After Geller gave trial testimony favorable to the Almogs, however, all claims against him were dismissed. (Tr. 8/13/93 at 90.)

Geller also cross-claimed against Defendants for defamation, making him Almog's ally. Geller's primary claim was that Defendants defamed him by sending financial documents to the Israeli tax authority, most of which were sent at the Israeli agency's request. (Tr. 8/9/93 at 69; 8/13/93 at 61.) Geller never disputed that the information sent was true, (Tr. 8/13/93 at 61); in fact, Geller admitted that after the investigation, he paid a "cofer" of 50,000 shekels (US $25,000) to the tax authority. At trial, he mischaracterized this payment as a "bail bond." (Tr. 8/11/93 at 46-48.) In truth, this payment was a civil fine in Israel that was paid to avoid criminal indictment. (Da. 1130-1135.)

As noted by the Superior Court of New Jersey, Appellate Division, the trial was rife with procedural "anomalies," the most significant of which was the unprecedented manner in which an "advisory" jury was used. The trial judge had initially

decided that the case would be decided by a jury; after the close of the evidence, however, he changed his mind and decided he would decide the case, sitting "as an Israeli judge — without a jury as with — as is the case in Israel." (Tr. 8/13/93, p.m. at 112.) He made this decision notwithstanding the fact that he had periodically announced to the jury that he was not listening to the proceedings. (*See e.g.*, Tr. 8/13/93, p.m. at 95.)

Nevertheless, he allowed the jury to deliberate in an "advisory" capacity, and ultimately used the jury's "advisory" opinion to craft his own judgment against Defendants. Then, without making any findings of fact or conclusions of law, the trial judge awarded the Almogs and Geller over $2,000,000 in compensatory damages, purportedly pursuant to Israeli law. (*Id.* at pp. 112-116.) The jury, having been instructed with portions of New Jersey law, returned with its "advisory" opinion in which it awarded the Almogs and Geller over $7,000,000 (including $5,500,000 in punitive damages) (Da 461-467 & 453-460) — more than the Defendants could ever hope to earn in their remaining lifetimes. In rendering these verdicts, however, the Defendants were not afforded individual consideration; rather, they were lumped together and treated as one unit, even in the punitive damages phase. (Da 461-467, Tr. 8/13/93, p.m. at 60-69; Tr. 9/21/93, pp. 59-62.)

Defendants urged the trial court to grant a new trial, noting, among other things, that advisory juries cannot be utilized in the fashion prescribed by the trial judge (*i.e.*, the "just in case I'm wrong use the other verdict" approach),[2] that due process

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[2] In the words of the trial judge: "In the event I'm correct that this is an Israeli case, then the Appellate Division will have the option of deciding whether I am correct insofar as acting as an Israeli judge or whether the New Jersey jury is the one they should listen to and whose verdict they should follow" (Tr. 8/13/93 at 112.)

requires individual determinations of guilt (Point of Error 3, Da 526), and that the punitive damages awarded were excessive. (Point of Error 23, Da 598-605.)

The Almogs and Geller returned to Israel with their New Jersey judgments. Defendants appealed. On appeal, Defendants were put in the strange and untenable position of attempting to argue against two verdicts: the operative bench verdict and the non-operative "advisory" jury verdict. They pressed on appeal the arguments concerning the due process requirements of individual determinations of guilt, (Amended Brief, Appellate Division, Point V), the excessiveness of the punitive damage verdict, (Reply Brief, Appellate Division, Point II-E), and the improprieties of the use and elevation of an "advisory" jury verdict, (Amended Brief, Point III, A-3; Point II A, B, & F.) On appeal, the Superior Court of New Jersey, Appellate Division, for the first time entered the "advisory" jury verdict as the final judgment in the case. Accordingly, on March 11, 1997, in accordance with this decision, an Amended Judgment was entered pursuant to the jury's verdict. (App. 30-36.) This was the first time that the punitive damage award ever became operative.

Defendants petitioned the New Jersey Supreme Court to grant certiorari noting, among other things, that the newly "elevated" punitive damage verdict clashed with the First Amendment and violated Defendants' due process rights as articulated by this Court. (*See*, Petition For Certiorari, Points I & III and Reply Brief, Points I & II.) The Defendants also continued to press their arguments regarding individualized determinations of guilt, as well as the fact that the odd and unprecedented use of the advisory jury procedure violated their due process rights. (*Id.* at Points II & III.)

The New Jersey Supreme Court granted the petition. (App.

24-25.) Two weeks after oral argument, however, that court dismissed the appeal, deciding, without explanation, that certiorari had been "improvidently granted." (App. 26-27.) Defendants timely sought reconsideration, which was denied. (App. 27-28.)

To stay execution on assets pending appeal, the individual Defendants sought refuge in the United States Bankruptcy Court for the District of New Jersey, (case numbers 97-B-413398 and 97-B-413399), which is awaiting the response of this Court before acting further. If this Court denies this petition, the impact on Defendants will be disastrous: Defendants will lose all of their assets, including their home, their life savings and their income in retirement. They will be penniless and destitute and will be forever encumbered by the grossly excessive 5.5 million dollar punitive damage verdict.

REASONS FOR GRANTING THE WRIT

I DETERRING SPEECH IS NOT A LEGITIMATE STATE INTEREST AND IS CERTAINLY NOT THE OVERRIDING STATE INTEREST IN A DEFAMATION CASE.

This case involves what the *New Jersey Law Journal* reported as possibly the "largest award for defamation that New Jersey has ever seen," (*N.J.L.J.*, Sept. 27, 1993, p. 3), and what appears to be the second highest defamation verdict ever sustained on appeal.[3] In its published decision, the Superior

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[3] This statement is based on the notation in a comprehensive defamation treatise that the second largest defamation verdict ever sustained on appeal was the three million dollar verdict in *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987). *See*, Robert D. Sack, LIBEL, SLANDER AND RELATED

Court of New Jersey, Appellate Division ("Superior Court"), vacated a bench verdict in excess of $2,000,000, and "elevated" an "advisory" jury verdict in excess of $7,000,000. Unlike the bench verdict, the advisory jury verdict included approximately $5,500,000 in punitive damages. While the compensatory damages alone exceeded the combined net worth of all three Defendants, the Superior Court's imposition of punitive damages was devastating — the award financially annihilated the two New Jersey residents and the small travel agency they ran out of their home, all because of speech they were unable to prove as true. As a result, the Defendants have been forced into bankruptcy and depend for survival on this Court of last resort.[4]

Not only did the Superior Court adopt the jury's award of punitive damages, but such damages were made the very basis of the trial court's choice of law determination. Because the Plaintiffs are all Israeli residents and most of the allegedly defamatory statements were made in Israel, and because Defendants are residents of New Jersey, application of the governmental interests test pitted Israel's interest in compensating its residents against New Jersey's interest in deterring misconduct. Although New Jersey and Israeli defamation law differ in virtually all respects, the only conflict examined by the Superior Court involved the application of

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PROBLEMS (1995 Supp.) at p. 147. The total verdict in this case is over three times as large.

[4] This Court's recent holding in *Cohen v. Cruz*, __ U.S. __, 118 S. Ct. 1212 (1998), may prevent discharge in bankruptcy of the punitive damage award entered in this case. Therefore, should the advisory jury verdict stand, the $5,500,000 punitive award (almost $8,000,000 now on account of interest) will haunt Defendants for the rest of their lives.

punitive damages: "They are available under New Jersey law, not under Israeli law . . . this difference alone is sufficient to invoke New Jersey law." *Almog v. ITAS*, 689 A.2d at 164.

Relying on its interpretation of *Gantes v. Kason Corp.*, 679 A.2d 106 (N.J. 1996), the Superior Court concluded that New Jersey's deterrence interest outweighs Israel's compensation interest because "deterrence of egregiously wrongful conduct is what punitive damages are all about." *Id.* Standing alone, this analysis may or may not be a proper application of New Jersey's governmental interest test.[5] Nevertheless, the State of New Jersey fails to recognize that its articulated preference for advancing deterrence interests over compensation interests cannot be applied in a defamation case because defamation lawsuits "chill" free speech. This Court has held that, in a defamation case, compensation for damage to reputation is the only legitimate governmental interest. *Gertz v. Welch, Inc.*, 418 U.S. 323, 349 (1974).

Defendants request that this Court grant certiorari and hold that a state cannot, consistent with the First Amendment, impose punitive damages, the only purpose of which are to punish, deter and retaliate against individual, non-commercial, speakers in a defamation case.[6]

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[5] Defendants are aware that this Court is not concerned with the application of a state choice of law determination, nor should it be. However, when application of that choice of law test intrudes on the free speech guarantees of the First Amendment, as in this case, this Court should become very concerned.

[6] The speech in this case was non-commercial because it did not "propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

A. Punitive Damages in Defamation Cases Violate The First Amendment And, Therefore, Are Unconstitutional

Punitive damage awards in defamation cases amount to punishment of expression and, therefore, violate the First Amendment to the United States Constitution. Since this Court has never expressly passed upon this important issue, this Court should grant this petition for certiorari and safeguard the free speech guarantees of the First Amendment by eliminating the availability of punitive damages in such cases.

This Court has recognized that constitutional challenges to punitive damages raise "important issues." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 818 (1986). In a defamation context, punitive damage awards should raise many suspicious judicial eyebrows since the conduct being punished enjoys constitutional protection.

Many jurists and judicial scholars,[7] including current and former members of this Court, have advocated the abolition of punitive damages in defamation cases. In *Rosenbloom v. Metromedia*, two Justices expressed disapproval with the status of punitive damages in defamation law. 403 U.S. 29, 86 (1971)(Marshall, J., dissenting) ("the appropriate resolution of the clash of societal values [reputation v. speech] is to restrict damages to actual losses"). Justice Marshall, joined by Justice Stewart, explained that punitive damages serve the same purposes as criminal penalties, but noted that unlike criminal penalties, "punitive damages are not awarded within discernible

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[7] *See, e.g.*, Comment, *Punitive Damages and Defamation Litigation: A Clear And Present Danger to Free Speech*, 64 Yale L.J. 610 (1955); Comment, *The Constitutionality of Punitive Damages in Libel Actions*, 45 Ford. L. Rev. 1382 (1977).

limits but can be awarded in unlimited amounts." *Id.* at 82-83. Accordingly, Justices Marshall and Stewart advocated abolishing punitive damages in defamation actions altogether. *See also, Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 771 (White, concurring) (noting that the efforts to protect speech by focusing on the liability side of the equation — *i.e.*, actual malice, different burdens of proof, the public/private figure distinction, *etc.* — may have failed, and focus should be shifted to the damages side of the equation. In this regard, Justice White stated that "punitive damages [should be] scrutinized as Justice Harlan suggested in *Rosenbloom*, or perhaps even entirely forbidden").

These concerns were echoed by the majority of the Court in *Gertz v. Welch, Inc.*, where the Court held that the sole state interest justifying defamation law was compensation for harm resulting from defamatory falsehoods. 418 U.S. at 348-49 (1974). As the Court stated, "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Id.* at 349. Moreover, at least one current member of this Court has suggested that punitive damages in defamation cases may violate the First Amendment. *See Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 38 (1991) (Scalia, J., concurring)(stating that "punitive damages, despite their historical sanction, can violate the First Amendment").

The view that punitive damages violate the First Amendment is also evident in the constitutional interpretations of several state supreme courts. *See, e.g., Stone v. Essex County Newspaper, Inc.*, 330 N.E.2d 161, 169 (Mass. 1975) (stating "we reject the allowance of punitive damages . . . in any defamation action, on any state of proof, whether based in negligence, or reckless or willful conduct. We so hold in recognition that the possibility of excessive and unbridled jury

verdicts, grounded on punitive assessments, may impermissibly chill the exercise of First Amendment rights"); *See also, Wheeler v. Green*, 593 P.2d 777, 789 (Or. 1979); *Tasket v. King Broadcasting*, 546 P.2d 81 (Wash. 1976).

Other state courts have held punitive damages unconstitutional when the defendant is considered a non-media defendant, *see Brantley v. Zantop International Airlines, Inc.*, 617 F.Supp. 1032, 1035 (E.D.Mich. 1985), and when compensatory damages are adequate to make a plaintiff whole. *See, e.g., McHale v. Lake Charles American Press*, 390 So. 2d 556, 578 (La. App. 1980)("in view of the substantial award for actual damages . . . an additional award of punitive damages may well have a chilling effect"); *Sprouse v. Clay Communications*, 211 S.E.2d 674, 692 (W. Va. 1975).

The reasoning of *McHale* finds support in this Court's *Dun & Bradstreet* plurality decision, wherein Justice Powell, joined by Justices Rehnquist and O'Connor, discussed the common law rationale for awarding presumed and punitive damages in defamation cases: presumed and punitive damages have historically been available because "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." 472 U.S. at 760. Thus, according to the *Dun & Bradstreet* plurality, since the extent of actual injury will not always be determinable, punitive and presumed damages should remain available so that the remedies for defamation remain effective. *Id.* Consistent with this rationale, when actual damages in a defamation case can be adequately determined, as in this case, the state interest in awarding presumed and punitive damages

cannot be considered substantial.[8]

Proponents of the above views recognize that punitive damages and the First Amendment are fundamentally at cross-purposes: It is a keystone of First Amendment jurisprudence that speech must not be "chilled;" yet the very purpose and undeniable effect of punitive damage awards in defamation cases is to punish and deter speech. It is no answer to say that punitive damages will deter only unprotected "false" speech because, given the limitations of human perception, memory and communication, certainty as to truth is not judicially knowable. *See generally*, Robert Sack, LIBEL, SLANDER AND RELATED PROBLEMS, 193-197.

In the present case, for instance, the speech of Defendants was true – Shalom Almog is an embezzler and a thief. The fact that the jury did not believe the Defendants bears no epistemological relevance to the inquiry. Defendants possess an accountant's report that proves that the words they stated were true. Evidentiary considerations and major errors by trial counsel, however, meant the accountant's report was never submitted to the jury. Indeed, in trying to submit their "evidentiary proofs" to the jury, Defendants were constrained by many factors: international treaties, rules of evidence, financial limitations, gross errors by trial counsel, and the fact that their witnesses and evidentiary proofs were halfway around the world. While these constraints meant they could not adduce sufficient evidence to convince a jury to find in their favor, it does not mean that what they said was untrue.

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[8] It should also be noted that *Dun & Bradstreet* involved commercial speech, whereas this case does not. To the extent this Court interprets *Dun & Bradstreet* to permit punitive damages in a defamation case, even where extensive compensatory damages are awarded, it should be limited to a commercial speech context.

Coupled with the prospect of punitive damages which may annihilate a speaker (such as in this case, where the speakers had all their assets, their home, and their life-savings taken away, and were driven into bankruptcy), the speaker's uncertainty as to her ability to prove the truth of her statements in a court of law results in a "chilling effect" on speech. Under such a regime, it is not enough that what the speaker says is true. Now the speaker must worry about whether she will be able to adduce sufficient admissible evidence to prove "truth" in a court of law, gamble that she is likeable enough that a jury believes her, and hope that if the jury does not, a punitive damage award does not wipe her out. It is little wonder that the specter of punitive damages causes persons with lawful messages to convey to "steer far wider of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *New York Times v. Sullivan*, 376 U.S. 254, 278 (1964) ("the pall of fear and timidity imposed [by large damage awards] is an atmosphere in which the First Amendment freedoms cannot survive").

Placing such a burden on an individual exercising his right to free speech wholly contradicts the guarantees that have been accorded to citizens of this nation throughout its history. As such, punitive damages in defamation cases collide with the freedoms guaranteed to each individual citizen of the United States by the First Amendment. Therefore, Defendants request that this Court grant this petition for certiorari and invalidate the use of punitive damages in defamation cases, or at least in cases involving non-commercial speech.

B. In Holding that Deterrence of Speech Outweighed Compensating Damage to Reputation the Superior Court Ignored *Gertz* and Compromised First Amendment Protection

Defendants' free speech guarantees were also

compromised when the Superior Court improperly ignored this Court's decree in *Gertz* that compensation for injury to reputation is the sole legitimate state interest in a defamation case. *See Gertz*, 418 U.S. at 348-49. Deterring speech was the sole basis of the New Jersey Court's choice of law determination. *Almog, v. ITAS*, 689 A.2d at 164.

As noted above, however, First Amendment values render the deterrence interest less important, if cognizable at all, in a defamation context, where the only legitimate interest is compensation. Consequently, the New Jersey court's decision was directly contrary to this Court's teaching in *Gertz*: that the only "legitimate state interest" in authorizing juries to award damages for defamation is "the compensation of individuals." *Gertz*, 418 U.S. at 341. "The States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Id.* at 349.

Given that compensation is the only legitimate government interest, application of Israeli law was required. *See e.g., Deemer v. Silk City Textile Machinery Co.*, 193 N.J. Super 643, 649 (App. Div. 1984) (foreign jurisdiction's interest in compensation prevails because New Jersey has no interest in compensating non-resident). The application of Israeli law was further compelled by the facts that: respondents are Israeli citizens; the relationship between the parties was centered in Israel's tourism market; the alleged defamation occurred almost completely in Israel;[9] the harm was felt completely in Israel; and finally, most of the witnesses and evidence were in Israel.

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[9] With regard to Geller, seven out of the nine alleged defamatory statements occurred in Israel. With regard to Almog, 20 out of the 27 alleged defamatory statements occurred in Israel. (Reply Brief, Appellate Division, pp. 22-23).

The entire rationale of the Superior Court's decision, in contrast, was based not on the legitimate goal of compensation, but rather on the notion that New Jersey's alleged interest in deterring defamatory speech justified exporting New Jersey's punitive damage law halfway around the world. In a defamation case, however, punitive damages are "'wholly irrelevant to the state interest' because '[t]hey are not compensation for injury.'" *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 770 (1985) (Brennan, J. dissenting) (citing *Gertz*, 418 U.S. at 350). Because deterrence is wholly irrelevant in a defamation case, it cannot be the overriding governmental interest.

Defendants do not quarrel with New Jersey's use of the governmental interest conflicts test, and do not seek review by this Court of that state court issue. Defendants do, however, contend that New Jersey's application of that test, and its explicit declaration that deterring speech is the overriding state interest, collides with the First Amendment and, therefore, demands the intervention of this Court.

II DEFENDANTS' PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED WHEN A MULTI-MILLION DOLLAR PUNITIVE VERDICT WAS IMPOSED THROUGH A BIZARRE "ADVISORY" JURY VERDICT PROCEDURE UNKNOWN TO THE COMMON LAW, AND NO JUDICIAL REVIEW WAS PROVIDED.

The Due Process Clause requires that fundamentally fair procedures be provided before a state may take property or, as here, transfer property from one person to another. *See North Ga. Finishing, Inc. v. Di-Chem Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Only meaningful due process review can, as the Fourteenth

Amendment demands, adequately protect the individual from the arbitrary exercise of governmental power. *See, e.g., Honda Motor Co., Ltd., v. Oberg*, 512 U.S. 415, 420-21, 429 (1994).

The $5.5 million punitive damage award entered in this case was made and approved under procedures that violate due process. First, the jury was not properly instructed, as it was told it was not required to make individual determinations of guilt before assessing liability or imposing punitive damages on Defendants. Second, the jury's verdict was unreviewable by the trial court, both by its denomination as "advisory" and by the fact that the trial judge was admittedly non-attentive during the trial. Finally, and most importantly, Defendants were deprived entirely of meaningful appellate review, primarily on account of the use of the bizarre "just in case I'm wrong" advisory jury procedure, as well as the perfunctory nature of the Superior Court's so-called "review." Far from applying objective criteria and carefully comparing the award to other awards and fines for similar conduct — steps approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1995), and mandated in *BMW of North America v. Gore*, 116 S.Ct. 1589 (1996) — the Superior Court simply declared that the conduct was egregious, stating:

> Suffice it to say that the awards were commensurate with the evidence of the defendants' wealth and represent, considering the egregious nature of the torts, an acceptable ratio between compensatory and punitive damages. Most significantly, however, following the jury's return of the punitive damages verdict, the trial judge, in an abundance of caution, afforded defendants an opportunity to demonstrate by way of discrete financial records any alleged excessiveness. Defendants failed in the end to take advantage of that opportunity. We are satisfied that they thereby waived their right to complain of the quantum.

Almog v. ITAS, 689 A.2d at 158. This single paragraph was all the "review" the Superior Court afforded. With that single paragraph — a conclusory statement that the award was commensurate with Defendant's wealth, an oblique reference to ratio, and an incorrect finding of waiver — the Superior Court rubber-stamped the "advisory" jury's award and stripped away what Defendants worked their entire lives to earn.[10] The lack of meaningful review was particularly stunning in this case as the multi-million dollar punitive damage award was implemented pursuant to a procedure that was so odd that it had never been utilized in the history of American jurisprudence, the elevation on appeal of an "advisory verdict."

"Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Honda Motor Co., Ltd., v.* Oberg, 512 U.S. 415, 421 (1994). Under the traditional common-law approach to punitive damages, a jury initially determines the amount of a punitive award, after being appropriately instructed. *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 15 (1991). The jury's determination is then reviewed by trial and appellate courts to determine "whether a punitive award is reasonably related to the goals of deterrence and retribution." *Id.*

Courts have consistently held that this method does not violate due process, *Id.* at 17. However, in cases where this procedure is absent and where the application of such procedure would have provided protection against arbitrary and inaccurate adjudication, "this Court has not hesitated to find the

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[10] In fact, it took away more. Defendants combined net worth at the time the verdict was rendered was $3,305,000, (Raa 134), less than one half the amount of the verdicts. Today Defendants' net worth is even less and the verdicts, due to interest, even more.

proceedings violative of due process." *Honda*, 512 U.S. at 430.

A. The Jury Was Misinstructed In That It Did Not Make Individual Determinations of Guilt

One of the circumstances this Court considered in *Haslip* in affirming the punitive award against the defendant was the fact that the jury instructions provided helpful guidance to the jury in determining its verdict. 499 U.S. at 19-20. In the present case, however, the jury instructions served affirmatively to confuse and misguide the jury, instructing them, among other things, that they were not required to give individual consideration to each defendant. The jury was essentially told it could lump all the Defendants and dump one combined punitive damage award on them. The instruction read, in relevant part: "if you find . . . it would be impracticable if not impossible to allocate punitive damages to each defendant separately, then you may render one punitive damage award against all defendants jointly and severally." (Da 600.) This "lump and dump" procedure was unconstitutional because it deprived Defendants of individual determinations of guilt, a hallmark of due process. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (state courts may not impose liability without fault in defamation actions); N.J. STAT. ANN. § 2A:15-5.13(e) (West 1998) (enacted in 1995, after the verdict in this case) ("In any action in which there are two or more defendants, an award of punitive damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant").

This same "lump and dump" procedure plagued the liability phase of the trial as well. After stating: "I'm treating ITAS and Shar and Ziemke as one entity here," (Court, Tr., 8/13/93, p.m., at 40; *see also* pp. 60, 62, 65, 68, 69), the trial court approved, over objection, a jury interrogatory that asked

whether either "ITAS, Ceil Shar, and/or Marilyn Ziemke" (emphasis added) may be found to have committed each element of slander against Almog and Geller. (Tr., 8/13/93, p.m., at 4.) Under such a charge, a finding that one of the three defendants committed the act results in liability against all.[11]

This instruction was especially improper in the present case because of the nature of the offense of slander. Two or more persons cannot utter the same words with the same effect; thus, slander is a tort incapable of joint commission and individual determinations of guilt must be rendered. *Shuping v. Barber*, 89 N.C. App. 242, 249, 365 S.E.2d 712, 716; 50 *Am. Jur.* 2d., LIBEL AND SLANDER, § 348. In a defamation case, the jury must be instructed to determine the liability for punitive damages of each of several defendants separately. *Wilson v. Savino*, 89 A.2d 399, 403 (N.J. 1952); *Refuse & Env. Systems v. Indus. Serv. of America*, 932 F.2d 37, 40 (1st Cir. 1991) ("in order for a defendant to be found individually liable for slander, the defendant must have personally made a slanderous statement about the plaintiff"). In the present case, due process required that an inquiry be made as to whether each defendant individually committed each element of the *prima facie* slander case, and that the individuals be given independent consideration with the punitive damages phase of the proceeding.

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[11] For example, the jury might have found that Ms. Ziemke satisfied the first element of defamation (but not Ms. Shar and ITAS) and assumed that it, therefore, had to answer "yes" to that particular question (which asked whether Shar, Ziemke and/or ITAS committed the first element). Had the jury been given proper instructions, however, it may have under the same scenario, answered "yes" to Ms. Ziemke, and "no" to Ms. Shar and ITAS, which would have necessitated a no liability finding in favor of Ms. Shar and ITAS on the entire defamation claim.

B. Defendants Were Deprived of Review at the Trial Level on Account of the Trial Judge's Inattentiveness During Trial And Inability to "Reflect in the Record" His Findings

In *Haslip*, this Court commended the state court for the fact that it required that a trial judge "reflect in the record the reasons" for reviewing, not reviewing, or remitting a punitive award. 499 U.S. at 20. Unlike the trial court in *Haslip*, the trial court here was not required to make findings on the record, and it made none. In stark contrast to the approach approved in *Haslip*, the trial court summarily denied Defendants' post-trial motions from the bench. The absence of any meaningful post-verdict review by the trial judge, including his failure to make findings of fact and conclusions of law, deprived Defendants of due process of law.

In addition, the trial judge was wholly inattentive to the evidence. Shockingly, he even heard motions at sidebar on different cases and conducted conferences in unrelated matters while the trial was proceeding, (Tr. 8/4/93 at 158-160; Tr. 8/4/93 at 80), and while key defense witnesses were testifying he stated he was not listening, or only giving "half an ear's" attention. (Tr. 8/13/93, p.m. at 95 & 7/22/93 at 134.) The Superior Court noted this impropriety, and chastised the trial judge. *Almog v. ITAS*, 689 A.2d at 162, n. 2. Noting the judge's "characteristic skill and diligence," however, the Superior Court was content to regard this as a "procedural lapse that will not be repeated." [12]

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[12] The trial judge appeared proud of himself for these procedural lapses, stating to the jury: "Ladies and gentlemen ... you've noticed that I've been handling other matters. I'd like to think the taxpayers are getting double their monies worth." (Tr. 7/22/93 at 134.)

Notwithstanding the trial judge's "characteristic skill and diligence," the "procedural lapses" that occurred in this case resulted in a devastating and wholly unreviewed $7,000,000 verdict (including $5,500,000 in punitive damages) against Defendants. Since the New Jersey Supreme Court abdicated its responsibility to correct this unconstitutional error, this Court, as the ultimate expositor of the constitution, must step in.

C. Defendants Were Deprived Of Appellate Review By Virtue of the Unprecedented Use of the "Advisory" Jury Procedure

In the present case, the post-trial procedure utilized by the Superior and Supreme Courts of New Jersey effectively denied Defendants any meaningful review of the jury's punitive award, and thereby denied Defendants the procedural due process guaranteed them by the Due Process Clause of the Fourteenth Amendment. After trial of the case, the jury, sitting only in an "advisory" capacity and having been instructed based on New Jersey law, awarded over $1,300,000 in compensatory damages and $5,500,000 in punitive damages. At the same time, the trial judge, having ruled that he would decide the case pursuant to Israeli law, awarded over $2,200,000 in compensatory damages to Plaintiffs. Having ruled that the jury's award would be merely an "advisory" verdict, the trial court judge provided no review of the punitive damages awarded by the jury.

On appeal the Superior Court vacated the bench verdict and "elevated" the jury's verdict to the final judgment in the cause. *Almog v. ITAS*, 689 A.2d 158 (N.J. Super. Ct. App. Div. 1997). Since the "advisory" jury verdict was not, at the time of appeal to the Superior Court, the final judgment in the case, and since the bench verdict did not include a punitive award, Defendants properly did not present the issue of whether the punitive award was unreasonable in their arguments to the

appellate court. *See, e.g., Ashland v. Ling-Temco-Vought, Inc.*, 711 F.2d 1431, 1438 (9th Cir. 1983)("[r]eview on appeal is of the findings of the court as if there had been no verdict from an advisory jury, and there can be no review of supposed errors relating to rulings before an instruction to the advisory jury."); *Anderson v. Sills*, 363 A.2d 381 (N.J. 1976) (stating that questions that have become moot or academic prior to judicial scrutiny are improper subjects for judicial review); 9 C. Wright & A. Miller, *Federal Practice and Procedures* § 2335 (1971) ("The review on appeal is from the Court's judgment as though no jury has been present. Since the verdict is advisory only, it follows that the failure of trial counsel to direct a verdict is not reversible error. In fact, a motion for a directed verdict seems pointless").

The Superior Court, after elevating the jury's verdict, recognized that Defendants had not presented the punitive award issue; however, rather than affording Defendants the opportunity to address that issue, the court rubber-stamped the jury's verdict and deemed the issue waived. *Almog v. ITAS*, 689 A.2d at 166. In this regard, the Superior Court erred. Defendants submitted a post-trial motion in which they argued against the punitive verdict. On appeal, the punitive award was plainly not in effect. Therefore, Defendants had no fair notice to challenge the verdict or seek review.

On appeal to the Supreme Court of New Jersey, Defendants raised the issue of the reasonableness of the jury's elevated punitive award, as well as the fact the award violated the First Amendment. After briefing and oral argument, however, that court dismissed the appeal, stating without opinion that certification had been improvidently granted. *Almog v. Israel Travel Advisory Service, Inc.*, 704 A.2d 1297 (N.J. 1998).

Through its imprudent and admittedly anomalous procedure, which the Superior Court acknowledged implicated procedural due process, *Almog v. ITAS*, 689 A.2d at 162, 165, the Superior Court nullified Defendants right to judicial review of the jury's punitive award. The jury's $5,500,000 punitive damage award was suddenly hoisted from its role as an "advisory" verdict, not merely to the level of final judgment in the case, but to the level of "final judgment eternal"— an unscrutinized judgment to which procedural due process apparently does not apply. Moreover, the Supreme Court of New Jersey, by dismissing Defendants' appeal to that court, has approved the Superior Court's abrogation of Defendants' due process rights, an approval which contradicts the law this Court developed in its previous decisions.

Given the acute danger of arbitrary deprivation of property posed by the imposition of punitive damage awards by juries, the Due Process Clause of the Fourteenth Amendment requires that punitive damage awards be reviewed for reasonableness by both the trial and appellate courts. *Honda*, 512 U.S. at 420-21; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring). New Jersey has attempted to sidestep this protection, thereby eliminating any meaningful review of punitive damage awards. The altogether unreviewed discretion of the jury is entirely inconsistent with due process. Therefore, Defendants respectfully requests this Court grant this petition and vacate the supernova of a verdict, rendered by a misguided jury, presided over by an apathetic judge and "elevated" by a bizarre "advisory" jury procedure.

III DEFENDANTS' SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED

While a verdict that is the product of good procedures is not insulated from substantive review, it is entitled to a strong

presumption of validity. *TXO*, 509 U.S. at 457. When the procedures, however, are suspect then the punitive damages that were the product of those procedures are suspect as well, and any presumptions of validity must vanish. *Id.*

The advisory jury's punitive award which was elevated to the final judgment in the case by the Superior Court is grossly excessive and arbitrary in violation of the standards set forth by this Court in *BMW*, 116 S.Ct. 1589 (1996). Therefore, this Court must grant this petition for certiorari so that Defendants' due process rights may be restored.

The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing "grossly excessive" punishment on a tortfeasor. *TXO*, 509 U.S. at 454. In certain cases, punitive damages may properly be imposed; however, when a punitive award can be fairly categorized as "grossly excessive" in relation to the state interests the award is designed to serve, it enters the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. *BMW*, 116 S.Ct. at 1595.

In determining whether a punitive award is excessive, the state interests that the award is designed to serve must first be identified. *Id.* This Court has held that, in a defamation case, the sole legitimate state interest is to compensate individuals for injury to reputation. *Gertz v. Welch, Inc.*, 418 U.S. 323, 348-49 (1974). Moreover, punitive damages appear not to play a role in the defamation arena unless actual damages cannot be calculated, in which case punitive and presumed damages may act as a surrogate. *Cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985).

Regardless of the interest involved, however, a punitive award must withstand the "excessiveness" inquiry. Assuming

this Court finds that an award of punitive damages does not violate the First Amendment, the advisory jury's punitive award cannot withstand the excessiveness inquiry developed in *BMW* and, therefore, must be vacated.

In *BMW*, this Court defined three guideposts to be used in determining whether a jury's punitive damage award is grossly excessive. 116 S.Ct. at 1598. Those guideposts are: (1) the degree of reprehensibility of the act; (2) the disparity between the harm or potential harm suffered and the punitive damages awarded; and (3) the difference between the punitive damages awarded and the penalties imposed in similar cases. *Id.* at 1598-9.

A. Degree of Reprehensibility

Pursuant to the accepted view that some wrongs are more blameworthy than others, this Court has held that punitive damages imposed on a defendant should reflect the enormity of his offense, *BMW*, 116 S.Ct. at 1599, and may not be "grossly out of proportion to the severity of the offense," *TXO*, 509 U.S. at 453. Moreover, as this Court has stated, "non-violent crimes are less serious than crimes marked by violence or the threat of violence," and conduct is less reprehensible when it "evinces no indifference to or reckless disregard for the health and safety of others." *BMW*, 116 S.Ct. at 1599. With this in mind, a comparison of the case law is very illuminating.

In *Filariga v. Pena-Irala*, 577 F. Supp. 860 (E.D. NY. 1984), the court stated:

> spread upon the records of this court is the evidence of wounds and of fractures, of burning and beating and of electric shock, of stabbing and whipping, and of mutilation, and finally, perhaps mercifully, of death, in

short the ultimate in human cruelty and brutality.

Accordingly, it awarded $5,000,000 in punitive damages to "make clear the depth of the international revulsion against torture and measure the award in accordance with the enormity of the offense;" *See also, Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) ($300,000 punitive damages awarded for torturing person by binding arms and legs, placing a wooden pole between legs to lift woman into the air, and repeatedly threatening with death); *Xuncax, et. al v. Gramajo*, 886 F. Supp. 162, 169 (average punitive award of 5.5 million to 6 different plaintiffs for a variety of acts of torture, mutilation, and killing); *J.S. and M.S. v. R.T.H*, 693 A.2d 1191 (N.J. App. 1997) ($25,000 punitive damage award against father for repeated sexual abuse of his daughters).

Including pre- and post- judgment interest, Almog was awarded more than the person who was beaten, whipped, burned and, ultimately, perhaps mercifully, killed. Furthermore, Geller was awarded forty times as much as the little girl who was repeatedly sexually abused by her father.

In addition, Defendants' conduct was most certainly non-violent, and did not in any way threaten the health and safety of Almog and Geller, or anyone else for that matter. The conduct of Defendants in the present case involved nothing more than speech, speech which was not actually untrue, but which simply could not be proven as true in the trial court. When the verdict awarded in this case is compared to the verdicts awarded in cases involving truly reprehensible conduct, the absurdity of the award is underscored. It is a grotesque parody of justice to permit a man who was called a thief to be awarded more punitive damages than one who was tortured and killed.

B. Ratio

Punitive damage awards must bear a "reasonable relationship" to the harm likely to result from the defendant's conduct, as well as the harm that has actually occurred. *TXO*, 509 U.S. at 460; *BMW*, 116 S.Ct. at 1601-2. A high ratio of punitive to compensatory damages may be justified in cases involving low awards of compensatory damages, or the injury is hard to detect, or the monetary value of non-economic harm difficult to determine, or where the potential loss to plaintiff had defendant succeeded in his scheme is large. *BMW*, 116 S.Ct. at 1602; *TXO*, 509 U.S. at 462. While there is no simple mathematical formula for determining the proper relationship, "a general concern of reasonableness . . . enters the constitutional calculus." *TXO*, 509 U.S. at 458.

In the present case, the jury awarded Plaintiff Almog $1,524,000 in compensatory damages and $4,500,000 in punitive damages. In addition, Cross-Claimant Geller was awarded $40,000 in compensatory damages and $1,000,000 in punitive damages. The ratios of punitive damages to compensatory damages for Almog and Geller, respectively, are 3 to 1 and an astonishing 25 to 1.

Since in *Haslip*, this Court found a ratio of 4:1 to come "close to the line" of constitutional impropriety, 499 U.S. at 23-24, Geller's ratio of 25 to 1 must certainly "raise a suspicious judicial eyebrow." Moreover, the unreasonableness of the awards is underscored by the inherent arbitrariness of the ratios. In awarding only $40,000 in compensatory damages to Geller (38 times less than the amount of compensatory damages awarded to Almog), it is apparent that the jury found Geller to have suffered substantially less harm. This finding, however, is belied by the comparison of the overwhelming 25 to 1 ratio of Geller's punitive to compensatory damage awards and the 3

to 1 ratio of Almog's punitive to compensatory damages.

In addition, when examined in relation to the instances described in *BMW* and *TXO* in which a high ratio may be justified, it is readily apparent that those instances are not analogous to the present case; the present case is not one in which compensatory damages were low or difficult to determine.[13] (Da 538-9.) Moreover, the harm done by Defendants allegedly wrongful acts, in the present case, was apparently measurable rather than "potential," as evidenced by the specific compensatory damages awarded by the jury. Upon closely examining the damages awarded in the present case, it is readily apparent that the required reasonable relationship does not exist between the Plaintiffs' respective punitive and compensatory awards. The awards are arbitrary and grossly excessive, evidencing the "taint" that contaminated the entire verdict.

C. Comparative Legislative Sanctions

"A reviewing court engaged in determining whether an

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[13] "Low" certainly does not describe the compensatory award in this case. Not only did Almog receive a specifically determined amount of compensatory damages, Almog essentially received a double recovery. Almog was awarded compensatory damages of $775,000 lost future wages for 17 years into the future as well as $525,000 for injury to his reputation. (Da 462) Obviously, any lost future income awarded to Almog was as a result of the supposed damage done to his reputation. Therefore, the damages awarded to Almog for injury to his reputation were duplicitous. Moreover, Almog's recovery of $ 775,000 in lost future wages was excessive in itself. *See Lewis v. Elliot*, 628 F. Supp. 512, 522 (D.D.C. 1986) ("After *Gertz* . . . a plaintiff cannot recover future damages absent proof they will actually be sustained").

award of punitive damages is excessive should 'accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *BMW*, 116 S.Ct. at 1603. However, the alleged wrongful conduct in the present case involves speech and, as such, cannot be regulated statutorily by New Jersey without violating the First Amendment to the United States Constitution.

Interestingly, prior to the elevation of the advisory jury verdict, the State of New Jersey enacted the Punitive Damages Act. N.J. STAT. ANN. § 2A:15-5.9 *et seq*. (West 1998). This Act, among other things, capped damages at the greater of a 5:1 ratio or $350,000, required a clear and convincing burden of proof and required individual determinations of guilt. While the Punitive Damages Act was enacted after the lawsuit in the present case was filed and, therefore, does not directly apply, the Act certainly illustrates the concern of the New Jersey legislature that punitive damage verdicts are often excessive and unreasonable. As demonstrated, the punitive awards against Defendants in the present case are clearly excessive, and unreasonable in violation of the standards set forth in *BMW*.

WHEREFORE, the Defendants/Petitioners respectfully request that this Court grant this petition for certiorari, vacate all verdicts and remand for a new trial consistent with the Due Process Clause and the First Amendment.

Respectfully Submitted,
MARILYN ZIEMKE, CELIA SHAR AND ISRAEL TRAVEL ADVISORY SERVICE, *Defendants/Petitioners*,

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CHRISTOPHER V. LANGONE
Attorney for Defendants/Petitioners

Dated: May 26, 1998

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Appendix A

Materials Required by Rule 14.1(i)(i): the opinions, orders, findings of fact and conclusions of law ... entered in conjunction with the judgment sought to be reviewed

In The

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

SHALOM ALMOG and IRIT ALMOG,

Plaintiffs-Respondents and Cross-Appellants,

vs.

ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR and MARILYN ZIEMKE,

Defendants-Appellants Cross-Defendant and Cross-Respondents,

and

BEN AMI GELLER,

Defendant-Respondent Cross-Claimant and Cross-Appellant,

and

ISRAEL RODRIGUE and ABIR TRAVEL & TOURS LTD., a Corporation of the State of Israel,

Defendants.

App. 2

Superior Court, Appellate Division.

Argued January 28, 1997
Decided February 25, 1997.
Before Judges Pressler, Humphreys and Wecker

On appeal from the Superior Court of New Jersey, Law Division, Essex County.

Christopher V. Langone, admitted pro hac vice, Chicago, IL, argued the cause for appellants/cross-respondents (Broder & Associates, attorneys; Eugene J. Sullivan of Peckar & Abramson, of counsel; H. Neil Broder, on the brief).

David Feinsilver argued the cause for respondents/cross-appellants Shalom Almog and Irit Almog (The Feinsilver Law Group, attorneys; Mr. Feinsilver, on the brief).

Andrew S. Berns, West Orange, argued the cause for respondent/cross-appellant Ben Ami Geller (Lampf, Lipkind, Prupis, Petigrow & Labue, attorneys; Mr. Berns, on the brief).

PRESSLER, P.J.A.D.

Following the five-week trial of this defamation action, the jury returned compensatory damage verdicts against defendants Israel Travel Advisory Service, Inc. (ITAS), and its owners, Celia Shar and her daughter Marilyn Ziemke, all New Jersey residents, in favor of plaintiffs Shalom Almog and his wife Irit Almog and in favor of defendant/cross-claimant Ben Ami Geller, all Israeli citizens. More specifically, the jury awarded Shalom Almog $525,000 for injury to reputation, $775,000 for loss of income, and $24,000 on a book account claim for a total of $1,324,000. It awarded Irit Almog $200,000 for her per quod claim and Geller $40,000 for loss of reputation. The jury

also determined that both Shalom Almog (plaintiff or Almōg) and Geller were entitled to punitive damages, and, following a second trial on that issue, the same jury awarded punitive damages to Almog of $4,500,000 and punitive damages of $1,000,000 to Geller. The jury found no cause for action on defendants' counterclaim against plaintiff. Defendants appeal. Plaintiffs and Geller cross-appeal. We affirm the jury's verdicts in all respects.

This action has a tortuous procedural and factual history. For purposes of addressing the issues raised on this appeal, the following brief factual recitation suffices. The jury could have found from the evidence that defendants Shar and Ziemke, New Jersey residents living and working in Livingston, are in the business of organizing tours to Israel for American travellers. During the period in controversy, the business was highly successful, ITAS sending between 3,000 and 3,500 tourists to Israel annually at a net profit of $500 each. The evidence adduced at the punitive damage hearing supports the finding that in more recent years and at the time of trial, the business was even more financially successful.

ITAS's modus operandi was to arrange for the international flights for its groups through its American agent but to turn all the Israeli arrangements — hotels, meals, sightseeing, entertainment, transportation, and the like — to a licensed Israeli land tour operator. The groups would then be conducted by a licensed Israeli tour guide acting as an independent contractor under arrangement with the land tour operator. In 1984, the Israeli land tour operator with whom ITAS dealt was Trans Global Travel. Geller, who worked as a guide with Trans Global, frequently guided ITAS groups. ITAS's financial arrangement with Trans Global, apparently typical of the Israeli tourist industry, was that Trans Global billed ITAS its actual costs incurred in its arrangements for the

groups plus a flat fee per tourist, an arrangement referred to as "net-net cost plus handling fee." The handling fee at that time was $60 per tourist, and the land tour operator shared it with the American travel agency with whom ITAS worked.

Sometime in 1984 Geller solicited Almog, then a colonel in the Israeli Defense Forces, to enter the travel business upon his retirement from the army and introduced him to Shar and Ziemke. In August 1985, when Almog retired from the army, Trans Global had split into two entities, TGT Travel Ltd. and Transglobal Travel Ltd. Geller and ITAS both elected to stay with TGT, and Almog joined them as a TGT employee, assigned exclusively to the ITAS account. A close working relationship developed between Almog and Geller. A close working relationship also developed between Almog and Shar and Ziemke, who were extremely pleased with his performance. By January 1986, defendants had increased TGT's handling fee to $85. In June of that year, as the result of agreements between TGT and Transglobal, ITAS, Geller and Almog all moved to Transglobal. Because of Almog's and Geller's importance to the ITAS account, Almog was given a minority ownership interest in Transglobal and Geller received, in addition to his salary from Transglobal, $10 out of every handling fee. In March 1988, Almog persuaded ITAS to move its business to another land tour operator, Abir Travel & Tours, Ltd., owned by defaulting defendant Israel Rodrigue. Geller moved to Abir as well and continued to receive $10 of the handling fee. Abir received the same. Almog received the balance of $65, if defendants' testimony were accepted that the handling fee remained at $85, or the balance of $80, if Almog's testimony that it had been increased to $100 were credited. In any event, Almog testified and the jury was free to believe that by September 1988, Almog's income was $190,000 annually.

In the summer of 1988, relations between Almog and Geller became strained after Geller accused Almog of

becoming too self-important. In October 1988, Rodrigue told Geller that Almog was holding back from ITAS by charging for services not actually rendered the touring groups and by not remitting certain rebates. In that month, Geller and Rodrigue went to Livingston with documents they thought demonstrated those charges. The jury was free to conclude from the evidence that not only were these relatively minor matters, involving the cost of box lunches, the use of hostesses, the quality of buses engaged, and a small hotel prepayment discount, but also that Almog's disposition of these matters was perfectly proper and in accord with industry standards and practices. In any event, and without inquiring of Almog at all, Shar and Ziemke immediately determined to fire him. They prepared and signed a letter addressed "To Whom it May Concern," advising that Almog no longer represented ITAS in any way and that vendors and suppliers should deal only with Geller and Rodrigue. When Geller and Rodrigue returned to Israel and showed Almog the letter, Almog telephoned Ziemke and Shar to ask for a meeting. They berated him over the telephone, accused him of embezzling $150,000 and of camouflaging invoices, and called him "inept and schizophrenic." Almog immediately went to Livingston, and during the course of his meeting there with Shar and Ziemke, they also accused him of having fraudulently obtained from them $39,000 by way of two checks drawn to his order the previous summer.

The jury was free to find from the evidence that Almog returned to Israel to look for another job but was unable to find one either in the tourist industry or indeed in any other industry in Israel because of the savage campaign of slander and libel that Shar and Ziemke then maliciously undertook against him both in the United States and in Israel. It was not until 1990 that Almog was finally able to find work at a greatly reduced salary as a plant manager in the Dominican Republic. The jury was free to find that Shar and Ziemke had falsely, repeatedly

and to great effect accused him of gross theft and of having an extramarital affair with his ex-wife. The jury could also have found that they published these stories to anyone who would listen, including Almog's former commanding officer, who advised him to leave Israel as his reputation and prospects were finished there. Both Almog and his wife gave testimony that the jury was free to credit respecting the substantial physical and emotional harm done to them as a result of defendants' actions.

Geller continued in defendants' good graces until August 1990. By that time, ITAS had returned its business to Transglobal, and Geller, by then acknowledged as a "top guide" in Israel, had followed. In the summer of 1990, Geller was hospitalized after suffering a stroke. When he was released from the hospital, he entered into an agreement with Transglobal, whereby Transglobal promised him twenty days of work each month until February 1991, when the arrangement would be reevaluated. Under the terms of that agreement, Geller was not required to work exclusively on ITAS tours and his per-tourist fee was increased to $15. The jury was free to find from the evidence that when Transglobal's principal, Benny Sivan, advised Shar and Ziemke of this agreement, they became enraged, vowed to "punish" Geller, called him a thief and refused to permit him to guide the tour scheduled for October. Sivan thereupon refused to handle that tour, and ITAS then severed its relationship with Transglobal. Thereafter Transglobal entered into a relationship with an American competitor of ITAS[1] and Geller continued to work both for Transglobal and other companies. At that point

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[1] The ensuing litigation between ITAS and that competitor is the subject of *Israel Travel Advis. Serv. v. Israel Iden. Tours*, 61 F.3d 1250 (7th Cir.1995), affirming the dismissal of ITAS's claims.

defendants mounted a retaliatory defamatory campaign against Geller, accusing him to all and sundry of having seduced the daughter of a major Israeli restaurant owner and causing Geller and his wife to be subject to criminal investigation by the Israeli tax authorities, by whom he was eventually exonerated after suffering out-of-pocket losses, impairment of reputation, and emotional distress.

In summary, we are satisfied from our review of this record that the jury had an ample evidential basis from which to conclude that defendants Shar and Ziemke and their company took concerted, malicious and purposeful action over a significant period of time to destroy both Almog and Geller as respected members of their community, that they did so with total disregard of the truth or of the personal consequences to them and their families, and that in large measure they succeeded.

The Almogs instituted this action in October 1989 in the Law Division, Essex County, by filing a twenty-nine count verified complaint against ITAS, Shar, Ziemke, Geller, Rodrigue and Abir, asserting a variety of causes, including defamation, intentional infliction of emotional harm, breach of contract, tortious interference with contractual relations and prospective economic advantage, and book account debts. Defendants ITAS, Shar and Ziemke responded by filing an action in Israel against the plaintiff, seeking over half a million dollars in damages from him on theories of trade libel and misappropriation of funds, making sure, as the jury was free to find, that the details of their cause of action were reported in the Israeli press. Eventually, the contours of this litigation were drawn by Rodrigue and Abir defaulting, the trial court's denying defendants' motion for dismissal on the ground of forum non conveniens, the filing by defendants of an amended answer and counterclaim, Geller's filing of an amended answer

and cross-claim charging defendants with various defamation causes, and defendants' abandonment of their Israeli action after entry by the Law Division of an order enjoining them from proceeding with their suit there, an order we affirmed on appeal by leave granted under Docket Number A-5275-90.

This five-week trial ensued. During the course of his summation, plaintiffs' attorney withdrew their affirmative claims against Geller. The trial judge charged the jury and sent it out to deliberate. It was during deliberations that the anomalous events giving rise to several main issues on appeal took place. In sum, the trial judge had reserved on defendants' application to apply Israeli rather than New Jersey law to plaintiffs' causes of action. Without deciding that issue, the trial judge had correctly charged the jury on New Jersey law. After the jury retired to commence its deliberations, the judge concluded that Israeli law should apply and since there are no civil juries under Israeli law, he further concluded that he should decide the case without a jury, rendering a bench verdict but deciding to take the verdict of the jury, which had no idea of what was then transpiring, as an advisory verdict. Beyond the conceptual problems posed by this procedure, there were practical problems as well, since the judge had, from time to time during the trial, been attending to other legal matters both on the bench and in chambers, having explained to the jury that his presence was not required one hundred percent of the time. Consequently, although the judge undertook to render a bench verdict, it appeared from the record that he had not given the trial his full attention.[2] Nevertheless, he found defendants

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2 Because we have decided that it is the jury verdict that must stand, not the bench verdict, we need not further address this aspect of the judge's conduct during the trial, since it did not affect the jury's verdict. We appreciate that the judge was motivated by a commendable desire to expedite other matters for

liable to both plaintiffs and Geller in defamation; awarded Geller total compensatory damages of $200,000; awarded Almog damages for loss of income of just over $900,000; reserved on the damage to reputation claim; reserved on Irit Almog's per quod claim; dismissed defendants' misappropriation counterclaim; reserved on the punitive damages claims; and sanctioned Shar $500 for each expletive she used during the course of her pretrial deposition, which was read into evidence since she did not appear at trial on the ground of illness.

After the foregoing events took place in the courtroom, the jury, entirely unaware of what had occurred during its deliberations, returned with the verdict we have already referred to, namely, a total compensatory award of $1,324,000 for Shalom Almog, $200,000 for Irit Almog, and $40,000 for Geller. A date was set for a supplementary trial on punitive damages, the jury returning five weeks later for that purpose. Again unaware that its fact- finding would not be dispositive, it returned the punitive damages awards we have described, namely, $4,500,000 for Almog and $1,000,000 for Geller.

We consider the issues raised on appeal in light of the foregoing recitation. We preface our specification of the issues, however, with this observation. R. 2:6-2(a)(5) requires that the party's legal argument be made under "appropriate

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which he was responsible and that he may have obtained the consent of counsel to his conduct. Nevertheless, his place was obviously on the bench and attending to the proceedings throughout. Beyond that, the judge's conduct made it impossible for him to render a bench verdict since he had missed some of the evidence. In view, however, of the judge's characteristic skill and diligence, we need make no further comment on what we are satisfied was a procedural lapse that will not be repeated.

point headings." Those are the arguments we consider. We are aware that by their copious footnotes, defendants suggest other legal issues. Raising legal issues on appeal in that manner is, however, wholly improper, putting the responding party at a disadvantage that implicates due process concerns. The respondent on appeal has a right to know precisely what legal arguments are being made and, in our view, need not respond to oblique hints and assertions made in footnotes. We do not suggest that footnotes in a brief are necessarily improper. They may be useful in limited situations for purposes of clarification of relevant ancillary matters or the like. We will not, however, countenance the raising of additional legal issues by that technique. Accordingly, we confine our address of the issues to those arguments properly made under appropriate point headings. We are also constrained to note that appellant's footnotes were printed in type considerably smaller than permitted by R. 2:6-10, so small, in fact, as to be barely legible. We regard this violation of the format rule as serious. If a party intends the court to read the footnotes, they will have to be printed in conformance with the rule.

Defendants argue (1) that their motion to dismiss on forum non conveniens grounds should have been granted, (2) that the bench verdict cannot stand because of the judge's inattention and his improper application of Israeli law and its effect of denying defendants their right to a trial by jury, (3) that there was insufficient competent evidence of defamation to warrant sending the case to the jury, (4) that the judge erred in not making individualized determinations as to each of the three defendants (and by inference that the unallocated jury verdict suffered from the same defect), (5) that the judge erred in barring evidence proffered in aid of their truth defense, and (6) that they were unduly prejudiced by plaintiffs' attorney's attack on their character during his closing argument. Plaintiffs and Geller cross appeal from the judge's decision to render a bench

verdict based on Israeli law, assert that New Jersey law applies, and argue that the jury's verdict on both compensatory and punitive damages be reinstated as the final verdict in the case.

We deal with the issues seriatim. We affirm the pretrial ruling denying the motion for dismissal on forum non conveniens grounds. We recognize that a cause of action involving citizens of different countries, events occurring in different countries, and evidence and witnesses located in different countries is inevitably affected by convenience considerations. We are, however, guided by well-settled principles. First, the plaintiff's choice of forum will ordinarily not be disturbed except upon a showing that it is demonstrably inappropriate. *Civic Southern Factors Corp. v. Bonat*, 65 N.J. 329, 332-333, 322 A.2d 436 (1974); *Am. Home Products Corp. v. Adriatic Ins.*, 286 N.J.Super. 24, 35, 668 A.2d 67 (App.Div.1995). Application of that standard requires a consideration of both private interest and public interest factors. Private interest factors include accessibility to sources of proof, the availability of compulsory process, whether there are premises to be viewed, and the practical concerns making a case susceptible to effective trial, including the enforceability of the ultimate judgment. The public interest factors address the burden imposed on the chosen forum as balanced against the forum's interest in the matter. *See D'Agostino v. Johnson & Johnson, Inc.*, 225 N.J.Super. 250, 262-263, 542 A.2d 44 (App.Div.1988), *aff'd*, 115 N.J. 491, 559 A.2d 420 (1989). And see *Mowrey v. Duriron Co.*, 260 N.J.Super. 402, 409-410, 616 A.2d 1300 (App.Div.1992); *Westinghouse v. Liberty Mut. Ins.*, 233 N.J.Super. 463, 469-470, 559 A.2d 435 (App.Div.1989). In the end, the question is simply whether plaintiff's choice of forum imposes a real hardship on defendants or results in undue harassment and vexation to them or to the legal system. *See, e.g., Creative Business v. Magnum*, 267 N.J.Super. 560, 572, 632 A.2d 298 (App.Div.1993).

We conclude, essentially for the reasons stated by the motion judge who denied the application, that there was nothing manifestly inappropriate about plaintiffs' choice of forum. We further note that many of the witnesses were here, and defendants themselves are residents here. Defendants had conceded the applicability of international treaties for the purpose of obtaining depositions in Israel of Israeli residents who would not voluntarily appear here. *See also* R. 4:11-5. Such documentary evidence as was not located here was readily transportable. All defendants' books and records are here. Moreover, there was no showing by defendants that they have assets in Israel available for satisfying a judgment. They have, however, considerable wealth available in New Jersey for that purpose. Finally, New Jersey has a substantial interest in the matter since the conduct of individuals resident here and a corporation doing business here was the matter in issue.

We address next the issues arising out of the jury-trial/bench-trial anomaly. The key question is choice of law. We conclude that New Jersey law applies. Consequently, we also conclude that the trial judge erred for that reason, if for no other, in rendering a bench verdict. And we are persuaded, under the unique circumstances here, that the jury verdict as to both compensatory and punitive damages must therefore be deemed to constitute the final judgment in the case.

First as to choice of law. As we have noted, egregious misconduct was committed in New Jersey, elsewhere in the United States, and in Israel by New Jersey residents. Malicious defamation was published in and from this State. Key events occurred in New Jersey, including the two fateful meetings in Livingston we have already described. Underlying contracts and agreements were made here. A fuller remedy is available to the victims under New Jersey law than in Israel in respect of the scope of damages. The question is whether these

significant contacts with New Jersey weight the application of the governmental interest test in favor of New Jersey law or Israeli law. We have no doubt in light of the totality of the circumstances that New Jersey's interest in the controversy as a whole is paramount to Israel's.

As the Supreme Court recently explained in *Gantes v. Kason Corp.*, 145 N.J. 478, 484-485, 679 A.2d 106 (1996), conflicts of law analysis requires the court first to identify the disparity in the law of each of the jurisdictions and then to identify the governmental policies of each underlying its own law. The parties agree that the codified defamation law of Israel specifies an apparently greater scope of defenses than does New Jersey's, although it is not at all clear that defendants' conduct would be any more defensible in Israel than here. The heart of the conflicts concern is, however, punitive damages. They are available under New Jersey law, not under Israeli law. We are satisfied that this difference alone is sufficient to invoke New Jersey law, particularly since a good deal of the defamatory conduct took place in this State as well as elsewhere in the United States. *Gantes* informs that conclusion. As the Court there made clear, this State has a significant interest in deterring wrongful conduct by its residents. The goal of our tort law is not only to afford the victim a remedy for a wrong but to deter the resident tortfeasor and others who would commit such wrongs from engaging in that wrongful conduct. *Id.* at 489, 679 A.2d 106. Deterrence of egregiously wrongful conduct is also what punitive damages are all about. Moreover, we do not see, and it has not been suggested to us with any particularity, how Israeli law would be offended by the application of New Jersey law in this regard. Certainly the fact that it does not award punitive damages is not indicative of an interest in whether New Jersey law allows assessment of a punitive damages award against a New Jersey resident. The point, of course, is that its citizens are not being

so assessed. By the same token, we do not see how Israeli law can reasonably be regarded as offended by one of its citizens being fully vindicated in the courts of another jurisdiction. In sum, New Jersey's strong deterrent interest does not appear to collide in any appreciable way with the policy of Israeli law.

Having concluded that New Jersey's defamation law applies, we must next determine the effect of that decision on the trial events that transpired from the time the jury retired to deliberate. This much is clear--it renders the bench verdict based on Israeli law a nullity. The issue is whether the bench verdict is also merely a superfluity, permitting the jury's verdicts to stand. We answer this question in the affirmative as well.

The courts of this State have not addressed in a reported opinion the question of whether an advisory jury verdict is ever susceptible of elevation as the judgment in the cause. We are aware that other jurisdictions have considered the question and generally conclude that such elevation is ordinarily inappropriate for several reasons. First, it is not reasonable for the trial judge to be accorded the discretion to choose, after the fact, between the court's determination and the jury's. More significantly, it is recognized that advisory juries ordinarily consider fewer than all the issues and that even where they consider all the issues, trial strategy is, to a significant extent, dependent upon who the ultimate fact finder will be. Consequently, issues of procedural due process are implicated when the judge defers, after the fact and without prior notice to the parties, to the advisory jury as the final arbiter. *See, e.g., Thompson v. Parkes*, 963 F.2d 885, 887-890 (6th Cir.1992); *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 53 (3d Cir.1989); *Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir.1981). Those concerns are obviously not, however, implicated here and defendants do not object to "elevation" of

the jury verdict as a conceptual matter. The point, of course, is that it was not until the jury retired to deliberate, after summations and charge, that its status as the final arbiter was challenged. The lawyers proceeded tactically on the understanding that this was a jury trial, as did the court. Nor did the jurors have any inkling during their deliberations that their status was anything but that of ultimate finders of the facts. That was what the judge had told them, and that is how they proceeded. The same is true of the later punitive damages trial. Thus, nothing to the contrary said by the trial judge entered into or affected or tainted the way the lawyers tried the case to the jury or the way the jury deliberated. In effect, this jury never functioned as or was constituted or denominated as an advisory jury. Consequently, there is no prejudice we can perceive in accepting the jury's fact-finding as the final verdict. On the other hand, not to do so would impose unnecessarily and egregiously on the parties and the court system. There is no reason to permit that to happen in the unique and anomalous circumstances here.

The balance of defendants' arguments require little discussion. R. 2:11-3(e)(1)(A), (B), and (E). The evidence of defendants' intentional, malicious and egregious wrongdoing was overwhelming. The defendants, moreover, acted in concert and as a unit, each endorsing and cooperating in the other's actions. Indeed, most of the actions were joint. The three defendants were represented by a single attorney. There was no claim by any of the three against any of the others for indemnification or contribution. In these circumstances we are satisfied that the unitary verdict of joint liability without individualized verdicts as to each or allocation of responsibility among them was entirely appropriate. We note, moreover, that defendants did not object on this ground at trial to the judge's charge, which instructed the jury that they could find defendants individually liable or jointly and severally liable, or

to the implementing interrogatories submitted to the jury. We are convinced that if it was error not to require individualized verdicts, that error was not, in the circumstances, plain error.[3] We are satisfied that the trial judge properly exercised his discretion in his evidential rulings. The proffered excluded testimony had not previously been disclosed in discovery and would have been unfairly prejudicial to plaintiffs. The judge did not err in its exclusion. *See* R. 4:17-7. And *see Lindenmuth v. Holden*, 296 N.J.Super. 42, 52-53, 685 A.2d 1351 (App.Div.1996). We further note that in the main, the hearsay evidence of Almog was fully corroborated. Its admission, in the light of the evidence as a whole, was not harmful error. Nor can we conclude that, taken as a whole and in context, the summation by plaintiffs' counsel was unduly prejudicial. *See, e.g., Daisey v. Keene Corp.*, 268 N.J.Super. 325, 336, 633 A.2d 979 (App.Div.1993).

There is one last matter we address. Defendants have not challenged the quantum of punitive damages allowed by the jury. Nevertheless, and because of the Supreme Court's expressed concern with runaway punitive damage verdicts in *Herman v. Sunshine Chemical Specialties, Inc.*, 133 N.J. 329, 338, 627 A.2d 1081 (1993), we have carefully examined the evidence adduced at the punitive damages trial. Suffice it to say that the awards were commensurate with the evidence of defendants' wealth and represent, considering the egregious nature of the torts, an acceptable ratio between compensatory and punitive damages. Most significantly, however, following

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[3] We need not address, because the question is not before us, whether defendants could in the future assert contribution or indemnification rights against each other. *See, e.g., Harley Davidson Motor Co., Inc. v. Advance Die Casting, Inc.*, 292 N.J.Super. 62, 678 A.2d 293 (App.Div.), certif. granted, 146 N.J. 568, 683 A.2d 1163 (1996).

the jury's return of the punitive damages verdict, the trial judge, in an abundance of caution, afforded defendants an opportunity to demonstrate by way of discrete financial records any alleged excessiveness. Defendants failed in the end to take advantage of that opportunity. We are satisfied that they thereby waived their right to complain of the quantum.

The bench verdict of the trial judge is vacated. The jury verdicts respecting liability, compensatory damages, and punitive damages are affirmed in all respects and shall be entered as the final judgment in the cause.

Appendix B

Materials Required by Rule 14.1(i)(ii): other relevant opinions, orders, findings of fact and conclusions of law entered in the case

SHALOM ALMOG AND IRIT ALMOG,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: ESSEX COUNTY
Plaintiffs,	:	
v.		Docket No. L-15658-89
	:	
ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR a/k/a CEIL SHAR; MARILYN ZIEMKE; BEN AMI GELLER; ISRAEL RODRIQUE; AND ABIR TRAVEL & TOURS, LTD., a Corporation of Israel,	:	**CIVIL ACTION**
Defendants.	:	

TRIAL COURT'S FINDINGS OF FACT RENDERED FROM THE BENCH (Transcript of 8/13/93, p.m., pp. 112-116)

THE COURT: Please be seated. The issue before me is whether I should act as an Israeli judge or as an American – or as a New Jersey judge. I feel that the – that issue is to refined and too difficult in the sense of deciding it right away. So what I did was I gave the jury the New Jersey law that applies to defamation.

However, I feel that I am correct in that I should act as an Israeli judge without – with a jury as with – as is the case in Israel, and I find in favor of both plaintiffs on the issues of

defamation and I am about to award partial damages: however, I will treat the jury as an advisory jury. In the event that I'm correct that this is an Israeli case, then the Appellate Division will have the option of deciding whether I'm correct insofar as acting as an Israeli judge or whether the New Jersey jury is the one that they should listen to and whose verdict that they should follow.

I find that the conduct of the defendants toward Ben Ami Geller was outrageous. I don't mean that in the Title 46 – restatement 46 context. I think it was vicious: I think it was unnecessary. I think their conduct in a call to the Mac Hass Nassad was totally unnecessary and beyond the bounds of the good faith requirements that are set forth in the Israeli law concerning defamation. I do not find that the good faith defense which is contained in Section 15 of that law applies here – the plea of good faith. I think that they defamed, outrageously, these two plaintiffs. And with reference to Mr. Geller, in a recent case that I had where a young black man of 30 years of age was put into jail for three days. Our American jury gave him $125,000 – for three days. Mr. Ben Ami Geller was in jail for one day, but he was an older man – he had fought for his country and insofar as my concern is – one element of the damages will be an award to Mr. Geller of $125 – $125,000 for the imprisonment and the – the bad experience with reference to the Mach Hass Nassad and his detention for one day.

I feel that the unnecessary – and I find it to be a fact that the defendants also – unnecessarily impugned his private life with no reason and no necessity to do it – it had nothing to do with their business – by indicating that he had affairs with other women and for that reason, I find another $75,000 I award, for a total to Mr. Geller of $200,000 American.

Insofar as the Colonel is concerned. I feel that what – and

let me say this for the record, that I don't want any snide remarks from the two plaintiff's attorneys about the fact that the defendant law firm here suggested that Israeli law applies – I felt long before they did – or early in the proceedings here – that this was an Israeli case. I think the Connell, Foley, Geiser firm did a marvelous job, but they can't make a silk purse out of a sow's ear.

I think that they ladies had a commendable – commendable goal of bringing people of all faiths to Israel, but somehow along the line they became disoriented. Somehow along the line their zeal became misguiding – misguided and I think that their actions thereafter were unwarranted, violent and vicious and they conducted some – what I would describe as indiscriminate broadsides against Colonel Almog.

As far as I'm concerned, at least - insofar as the loss of his future employment is concerned – although I don't agree that it should be 175 reduced to present value – I think that – my recollection was with $60,000 – I think that any jury in the world would think that they – nobody could last with these women in their present state. I would imagine something around $120,000, since $60,000 was the amount that I though [sic] that colonel Almog had said that he thought he could earn. I will project the additional $60,000 into the future for 15 or 17 years - whenever he's going to be 65 – and discount that to present value at the rate of whatever percentage Mr. Feinsilver projected in – on his projections. So he'll have to work out those projections again. Insofar as the damage –

MR. FEINSILVER: What's the number you're projecting forward?

THE COURT: I – it's $120,000, less $60,000 which makes—

MR. FEINSILVER: It was $50,000 that we –

THE COURT: Well, I thought he said $60,000.

MR. FEINSILVER: No, he testified $50,000. Your Honor.

THE COURT: $50,000? Okay. I think that comes – my arithmetic – 470,000 projected for 15 years – or until he's age 65, discounted to present value. Okay?

I think that damage to his reputation done in Israel was stupendous – was terrible. And the word that I'm searching for, I think, is odious. So, as far as I'm concerned – and let me say this. Nothing comes out of this room about this decision until this jury has rendered everything. And so I'm putting a direct order on everybody in this room that nothing is to be mentioned about my decision. I don't want this jury to be affected by me at all. I think they're going to do a better job than me, but they may not – I don't know.

Insofar, as the damage to Colonel Almog's reputation in Israel, I would like to hear that the jury has to say about that first. That may guide me insofar as the reputation aspect of this loss.

SHALOM ALMOG AND IRIT ALMOG,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: ESSEX COUNTY
Plaintiffs,	:	
v.	:	Docket No. L-15658-89
ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR a/k/a CEIL SHAR; MARILYN ZIEMKE; BEN AMI GELLER; ISRAEL RODRIQUE; AND ABIR TRAVEL & TOURS, LTD., a Corporation of Israel,	:	**CIVIL ACTION**
Defendants.	:	

ORDER DENYING DEFENDANTS' APPLICATIONS FOR (A) A NEW TRIAL; (B) JUDGMENT NOTWITHSTANDING THE VERDICT
(Filed January 14, 1994)

THIS MATTER having been opened to the Court upon the application of Connell, Foley & Geiser, Esqs. (Thomas S. Cosma, Esq., appearing) attorneys for defendants Israel Travel Advisory Service, Inc., Ceil Shar and Marilyn Ziemke for the entry of an Order granting judgment notwithstanding the verdict, or in the alternative, for a new trial; upon notices to, and in the presence of Feinsilver & Weiner, Esqs. (David Feinsilver, Esq., appearing attorneys for plaintiffs and Lampf, Lipkind, Prupis, Petigrow & LaBue, Esqs. (Andrew S. Berns, Esq.), attorneys for cross-claimant Ben Ami Geller appearing in opposition thereto, and this Court having read and considered the moving and answering papers; submitted by the respective parties; and this Court having the benefit of oral

argument had on November 19, 1993;[1] and for the reasons stated by the Court on the record, and for good cause shown:

IT IS ON THIS 14TH DAY OF JANUARY 1998:

ORDERED AND ADJUDGED as follows:

1. The application of defendants Israel Travel Advisory Service, Inc., Celia Shar; and Marilyn Ziemke for judgment notwithstanding the verdict is hereby denied in its entirety.

2. The application of defendants Israel Travel Advisory Service, Inc.; Celia Shar; and Marilyn Ziemke for a new trial is hereby denied in its entirety.

/s/
DOUGLAS T. HAGUE, J.S.C.

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[1] The transcripts of November 19, 1993, included in record as Pa604 do not appear to contain the oral argument referenced. Therefore, they have not been included in this Appendix. Counsel is not aware of what transcript the Court is referring to.

In The
SUPREME COURT OF NEW JERSEY

SHALOM ALMOG and IRIT ALMOG,

Plaintiffs-Respondents and Cross-Appellants,

vs.

ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR and MARILYN ZIEMKE,

Defendants-Appellants Cross-Defendant and Cross-Respondents,

and

BEN AMI GELLER,

Defendant-Respondent Cross-Claimant and Cross-Appellant,

and

ISRAEL RODRIGUE and ABIR TRAVEL & TOURS LTD., a Corporation of the State of Israel,

Defendants.

Appeal From the Superior Court of New Jersey Appellate Division

Decided: Aug. 6, 1997.

ON PETITION FOR CERTIFICATION:

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1679-93T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted.

WITNESS, the Horable Deborah T. Poritz, Chief Justice, at Trenton, this 6th day of August, 1997

/s/
CLERK OF THE SUPREME COURT

In The
SUPREME COURT OF NEW JERSEY

SHALOM ALMOG and IRIT ALMOG,

Plaintiffs-Respondents and Cross-Appellants,

vs.

ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR and MARILYN ZIEMKE,

Defendants-Appellants Cross-Defendant and Cross-Respondents,

and

BEN AMI GELLER,

Defendant-Respondent Cross-Claimant and Cross-Appellant,

and

ISRAEL RODRIGUE and ABIR TRAVEL & TOURS LTD., a Corporation of the State of Israel,

Defendants.

Appeal From the Superior Court of New Jersey Appellate Division

Decided: Jan. 21, 1998.

ORDER:

Certification was improvidently granted;

It is ORDERED that the within appeal be and hereby is dismissed.

/s/
CLERK OF THE SUPREME COURT

Appendix C

Materials Required by Rule 14.1(i)(iii): . . . Orders on rehearing:

In The

SUPREME COURT OF NEW JERSEY

SHALOM ALMOG and IRIT ALMOG,

Plaintiffs-Respondents and Cross-Appellants,

vs.

ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR and MARILYN ZIEMKE,

Defendants-Appellants Cross-Defendant and Cross-Respondents,

and

BEN AMI GELLER,

Defendant-Respondent Cross-Claimant and Cross-Appellant,

and

ISRAEL RODRIGUE and ABIR TRAVEL & TOURS LTD., a Corporation of the State of Israel,

Defendants.

Appeal From the Superior Court of New Jersey Appellate Division

Dated: February 25, 1998

ORDER:

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the dismissal of the appeal is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 24th day of February, 1998.

/s/
CLERK OF THE SUPREME COURT

Appendix D

Materials Required by Rule 14.1(i)(iv): the judgment sought to be reviewed.

SHALOM ALMOG AND IRIT ALMOG,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: ESSEX COUNTY
Plaintiffs,	:	
v.	:	Docket No. L-15658-89
ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR a/k/a CEIL SHAR; MARILYN ZIEMKE; BEN AMI GELLER; ISRAEL RODRIQUE; AND ABIR TRAVEL & TOURS, LTD., a Corporation of Israel,	:	**CIVIL ACTION**
Defendants.	:	

AMENDED JUDGMENT PURSUANT TO OPINION RENDERED BY THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION ON FEBRUARY 25, 1997
(Filed March 11, 1997)

This matter having come on for trial before a jury on July 12, 1993 through August 16, 1993, and resuming on September 20, 1993 and concluding on September 21, 1993; and this Court having rendered its own bench verdict herein, and having entered Judgment thereon on October 8, 1993; and the defendants Israel Travel Advisory Service, Inc.; Celia Shar and Marilyn Ziemke having taken an appeal from all affirmative damage awards contained inn said judgment as made in favor of the plaintiffs (except for a certain book account award from which no appeal was taken) and from the affirmative Cross-

Claim of defendant Ben Ami Geller; and the plaintiffs and said Defendant-Cross-Claimant having filed a cross appeal to have said jury verdict rendered herein reduced to judgment; and the Appellate Division the Superior Court of New Jersey, Honorable Sylvia Pressler, P.J.A.D., presiding, having had the benefit of oral argument on January 28, 1997; Christopher V. Langone, Esq., and H. Neil Broder, Esq., appearing for defendants Israel Travel Advisory Service Inc., Celia Shar and Marilyn Ziemke; David Feinsilver Esq., of The Feinsilver Law Group, P.C., appearing for plaintiffs, and Andrew S. Berns, Esq., of Lampf, Kipkind, Prupis, Petigrow and Labue, P.C., appearing for Defendant-Cross Claimant Ben Ami Geller; and the Appellate Division having rendered a decision, as set forth in its unanimous written opinion delivered by the Honorable Sylvia Pressler, P.J.A.D., on February 25, 1997 vacating the bench verdict rendered herein and affirming the August 16, 1993 and September 21, 1993 jury verdicts rendered herein in all respects; and for good cause shown, it is on this 11th day of March, 1997,

ORDERED and adjudged as follows:

1. all claims asserted by any of the parties hereto in their respective pleadings herein which were withdrawn or abandoned at trial are dismissed with prejudice;

2. all claims asserted by defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke against plaintiff Shalom Almog, other than a claim for $39,000.00 are dismissed with prejudice, as having been expressly withdrawn at trial;

3. all claims of defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke against cross-claimant Ben Ami Geller other than for indemnification and contribution are dismissed with prejudice, as having been

expressly withdrawn at trial;

4. Defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke's claims against defendant-cross claimant Ben Ami Geller for indemnification and contribution, pursuant to jury verdict, are denied with prejudice;

5. plaintiff Shalom Almog's claims against crossclaimant Ben Ami Geller are dismissed with prejudice, as having been expressly withdrawn at trial;

6. the claims of plaintiffs Shalom and Irit Almog against defendant Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke for intentional infliction of emotional distress, negligent infliction of emotional distress and outrage, having been dismissed by this Court for failure to state of cause of action as a matter of law, and not having been presented to the jury for a verdict, are denied with prejudice;

7. the claims of plaintiff Shalom Almog against defendant Israel Travel Advisory Service, Inc., for breach of an oral lifetime personal services contract, pursuant to jury verdict, are denied with prejudice;

8. plaintiff, Shalom Almog is hereby awarded, pursuant to jury verdict, compensatory damages for loss of income proximately caused by the defamatory conduct of defendants, Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally in the amount of $725,000.00, together with prejudgment interest thereon from October 10, 1989 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $329,092.15;

9. plaintiff Shalom Almog is hereby awarded, pursuant to jury verdict, compensatory damages for injury to his

reputation proximately caused by the defamatory conduct of defendants' Israel Travel Advisory Service, Inc.; Celia Shar and Marilyn Ziemke, jointly and severally in the amount of $525,000.00, together with prejudgment interest from October 10, 1989 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $238,306.85;

10. plaintiff Shalom Almog is hereby awarded, pursuant to jury verdict, punitive damages against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally in the amount of $4,500,000.00 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $2,042,630.14;

11. plaintiff Shalom Almog is hereby awarded, pursuant to jury verdict, compensatory damages on his book account claim against defendant Israel Travel Advisory Service, Inc., in the amount of $24,000.00, together with prejudgment interest thereon from August 17, 1988 (date of demand) to the date of the Appellate Division decision (of February 25, 1997) in the amount of $11,430.58;

12. plaintiff Irit Almog is hereby awarded pursuant, to jury verdict, damages on her *per quad* claim against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally in the amount of $200,000.00, together with prejudgment interest thereon from October 10, 1989 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $90,783.56;

13. defendant-cross claimant Ben Ami Geller is hereby awarded, pursuant to jury verdict, compensatory damages for injury to his reputation proximately caused by the defamatory conduct of defendants, Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke jointly and severally, in the amount of $40,000.00, together with prejudgment interest from

April 9, 1991 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $13,405.48;

14. defendant-cross claimant Ben Ami Geller is hereby awarded, pursuant to jury verdict, punitive damages against defendant Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, in the amount of $1,000,000.00 together with prejudgment interest from April 9, 1991 to the date of the Appellate Division decision (of February 25, 1997) in the amount of $335,136.99;

15. pursuant to decretal paragraphs 8 through 10 above, JUDGMENT is hereby entered in favor or plaintiff Shalom Almog and against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, inclusive of prejudgment interest through February 25, 1997, in the amount of $8,360,029.14. Per diem interest shall accrue thereon in the amount of $1,181,51 per day thereafter;

16. Pursuant to decretal paragraph 11 above, JUDGMENT is hereby entered in favor of plaintiff Shalom Almog against defendant Israel Travel Advisory Service, Inc., inclusive of prejudgment interest through February 25, 1997, in the amount of $35, 430.58. Per diem interest shall accrue thereon in the amount of $4.93 per day thereafter;

17. pursuant to decretal paragraph 12 above, JUDGMENT is hereby entered in favor of plaintiff Irit Almog against defendant Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, inclusive of prejudgment interest through February 25, 1997, in the amount of $290,783.56. Per diem interest shall accrue thereon in the amount of $41.10 per day thereafter.

18. Pursuant to decretal paragraphs 13 and 14 above, JUDGMENT is hereby entered favor of defendant-

crossclaimant Ben Ami Geller against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, inclusive of prejudgment interest through February 25, 1997, in the amount of $1,388.542.47. Per diem interest shall accrue thereon in the amount of $213.70 per day.

19. plaintiffs Shalom and Irit Almog and co-defendant crossclaimant Ben Ami Geller are hereby awarded taxed costs of this litigation, payable by defendant Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, to be fixed and determined by this Court after submission of affidavits by counsel setting forth the costs sought to be taxed, as incurred by Shalom and Irit Almog and Ben Ami Geller in this litigation. Limited jurisdiction is retained for this purpose;

20. defendant Marilyn Ziemke is hereby sanctioned in the amount of $500.00 for every pejorative she uttered during the course of the depositions in this matter (payable to the party(ies) whose attorney was conducting the deposition at the time(s) of same. Plaintiffs' counsel shall submit an affidavit setting forth within 30 days all pejoratives uttered by Marilyn Ziemke during depositions. Limited jurisdictions is retained for this purpose.

21. defendants Ceil Shar and Marilyn Ziemke are hereby each individually sanctions in the amount of $500.00 for each time that she refused to answer questions, or was otherwise disruptive during the course of depositions in this matter (payable to the party(ies) whose attorney was conducting the examination at the time of each disruptive action. Plaintiff's counsel shall submit within 30 days an affidavit setting forth each instance in which defendants Ceil Shar and Marilyn Ziemke refused to answer questions posed and/or was otherwise disruptive during the course of depositions. Limited jurisdiction is retained for this purpose; and

22. this judgment hereby modifies and supersedes in all respects the Court's previous judgment entered herein on October 8, 1993.

/s/
DOUGLAS T. HAGUE, J.S.C.

Dated: 3/11/97

SHALOM ALMOG AND IRIT ALMOG,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: ESSEX COUNTY
Plaintiffs,	:	
v.	:	Docket No. L-15658-89
ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey Corporation; CELIA SHAR a/k/a CEIL SHAR; MARILYN ZIEMKE; BEN AMI GELLER; ISRAEL RODRIQUE; AND ABIR TRAVEL & TOURS, – LTD., a Corporation of Israel,	:	**CIVIL ACTION**
Defendants.	:	

JUDGMENT PURSUANT TO DECISION AS TO LIABILITY AND DAMAGES (Reserved only as to the amount of counsel fees, costs and sanctions to be awarded)
(Filed October 8, 1993)

This matter having come on for trial before a jury on July 12, 1993 through August 16, 1993, and resuming on September 20, 1993 and concluding on September 21, 1993; David Feinsilver, Esq., and Connie A. Matteo, Esq. of Feinsilver & Weiner, Esqs., appearing for plaintiffs Shalom and Irit Almog and Andrew S. Berns, Esq. of Lampf, Lipkind, Prupis & Petigrow, Esqs., appearing for defendant cross-claimant Ben Ami Geller and Thomas S. Cosma, Esq., and George M. Parsells, III, Esq., of Connell, Foley & Geiser, Esqs., appearing for defendants Israel Travel Advisory Service, Inc.; Celia Shar and Marilyn Ziemke; and defendants Israel Travel Advisory Service, Inc.; Celia Shar and Marilyn Ziemke having requested that this Court render a decision in conformance with the laws of the State of Israel, as such law was presented to it by counsel

for the defendants; and the trial in this matter having been presented before a jury, and this Court having considered the separate verdicts rendered by the jury, in the form of answers to special interrogatories on August 16, 1993 and September 21, 1993, in rendering its own decision; and for the reasons stated by this Court on the record on August 13, 1993 and September 21, 1993; and for good cause shown this on this 8th day of October 1993.

ORDERED and adjudged as follows:

1. The claims of plaintiffs Shalom and Irit Almog, as well as the crossclaims of defendant-crossclaimant Ben Ami Geller shall be governed by the laws of the State of Israel.

2. the verdicts rendered by the jury in this matter on August 16, 1993 and September 21, 1993 have been utilized by this Court solely for advisory purposes pursuant to this Court's ruling that the plaintiffs and crossclaimant Ben Ami Geller are not entitled to a trial by jury pursuant to the laws of the State of Israel. However, said verdicts of August 16, 1993 and September 21, 1993, are to be preserved, in the event that it is ultimately determined on appeal that the laws of the State of New Jersey are to govern, or that one or more of said verdicts shall control;

3. all claims asserted by any of the parties hereto in their respective pleadings herein which were withdrawn or abandoned at trial are dismissed with prejudice;

4. all claims asserted by defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke against plaintiff Shalom Almog, other than a claim for $39,000.00 (based on a series of credits and debits) are dismissed with prejudice, as having been expressly withdrawn at trial;

5. all claims of defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke against cross-claimant Ben Ami Geller other than for indemnification and contribution are dismissed with prejudice, as having been expressly withdrawn at trial;

6. Defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke's claims against defendant-cross claimant Ben Ami Geller for indemnification and contribution (which were rejected by the jury) are denied;

7. plaintiff Shalom Almog's claims against crossclaimant Ben Ami Geller are dismissed with prejudice, as having been expressly withdrawn at trial;

8. the claims of plaintiffs Shalom and Irit Almog against defendant Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke for intentional infliction of emotional distress, negligent infliction of emotional distress and outrage, having been dismissed by this Court for failure to state of cause of action as a matter of law, and not having been presented to the jury for a verdict, are denied;

9. the claims of plaintiff Shalom Almog against Defendant Israel Travel Advisory Service, Inc., for breach of an oral lifetime personal services contract are denied;

10. this Court finds by a preponderance of the credible evidence that defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke and defamatory statements of fact which concerned said plaintiff, with actual knowledge that the statements were false or with a reckless disregard for the truth or falsity thereof;

11. this Court finds that plaintiff Shalom Almog is entitled to recover compensatory damages for loss of income

proximately cause by such defamatory statements in the amount $911,141.47, plus prejudgment interest thereon from October 10, 1989 to the date of this judgment, in the amount of $112,804.51;

12. this Court finds that plaintiff Shalom Almog is entitled to recover compensatory damages for injury to his reputation proximately caused by the defamatory statements in the amount of $500,000.00, plus prejudgment interest from October 10, 1989 to the date of this judgment in the amount of $149,034.24;

13. this Court finds by a preponderance of the credible evidence that plaintiff Shalom Almog is entitled to recover compensatory damages on his 'book account' claim (or claim based on a series of debit and credits) in the amount of $24,000.00, plus prejudgment interest thereon from August 17, 1988 (date of demand) to the date of this judgment, in the amount of $8,992.77;

14. this Court finds that plaintiff Irit Almog is entitled to recover damages due to her loss of Shalom Almog's services, society, and consortium in the amount of $200,000.00, plus prejudgment interest thereon from October 10, 1989 to the date of this judgment in the amount of $59,613.69;

15. this Court finds by a preponderance of the credible evidence that defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke communicated to persons other than crossclaimant Ben Ami Geller false and defamatory statements of fact concerning Ben Ami Geller with actual knowledge that the statements were false or reckless disregard of the truth or falsity thereof;

16. this Court finds that Ben Ami Geller is entitled to recover compensatory damages for injuries proximately caused by such defamatory statements in the amount of $200,000.00,

plus prejudgment interest from April 9, 1991 to the date of this judgment, in the amount of $35,857.53;

17. this Court finds that defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke by, *inter alia*, signing letters jointly, participating in meetings and conversations where defamatory statements were made, acted jointly; that each said defendant participated in, adopted, approved or ratified the conduct of the others; and that they conduct their affairs jointly to such an extent that it is impractical, if not impossible, to allocate punitive damages to each defendant separately. Hence, all compensatory and punitive damage and cost awards (other than sanctions) provided for herein are against all defendants jointly and severally;

18. pursuant to decretal paragraphs 11 through 13 above, judgment is hereby entered in favor of plaintiff Shalom Almog against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke jointly and severally in the amount of $1,765,586.60;

19. pursuant to decretal paragraph 14 above, judgment is hereby entered in favor or plaintiff Irit Almog against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke jointly and severally in the amount of $259,613.69;

20. pursuant to decretal paragraph 16 above, judgment is hereby entered in favor of defendant-crossclaimant Ben Ami Geller against defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke jointly and severally in the amount of $235,857.53;

21. plaintiffs Shalom and Irit Almog and co-defendant crossclaimant Ben Ami Geller are hereby awarded taxed costs

of this litigations, payable by defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, to be fixed and determined by this Court pursuant to Israeli law, after submission of affidavits by counsel settings forth the costs sought to be taxed, as incurred by Shalom and Irit Almog and Ben Ami Geller in this litigation. Limited jurisdiction is retained for this purpose;

22. plaintiffs Shalom and Irit Almog and co-defendant crossclaimant Ben Ami Geller are hereby denied counsel fees pursuant to New Jersey law, payable by defendants Israel Travel Advisory Service, Inc., Celia Shar and Marilyn Ziemke, jointly and severally, to be fixed and determined by this Court after submission of affidavits of service by counsel for Shalom and Irit Almog and Ben Ami Geller. However, this Court will issue an advisory opinion as to amount for appeal purposes. Limited jurisdiction is retained for this purpose;

23. defendant Marilyn Ziemke is hereby sanctioned in the amount of $500.00 for every pejorative she uttered during the course of depositions in this matter (payable to the party(ies) whose attorney was conducting the deposition at the time(s) of same. Plaintiffs' counsel shall submit an affidavit setting forth within 30 days all pejoratives uttered by Marilyn Ziemke during depositions. Limited jurisdiction is retained for this purpose.

24. defendants Ceil Shar and Marilyn Ziemke are hereby each individually sanctioned in the amount of $500.00 for each time that she refused to answer questions, or was otherwise disruptive during the course of depositions in this matter (payable to the party(ies) whose attorney was conducting the examination at the time of each disruptive action. Plaintiffs' counsel shall submit within 30 days an affidavit setting forth each instance in which defendants Ceil Shar or Marilyn Ziemke refused to answer questions posed and/or was otherwise

disruptive during the course of depositions; and

25. this Court finds and certifies pursuant to Rules 1:7-4 and 4:42-2 that;

a. no just cause exists for delay of enforcement of decretal paragraphs 1 through 20, inclusive, pending resolution of this Court's costs and sanction awards, and that

b. the economic resources of the defendants far exceed that of the plaintiffs and that of the cross-claimant;

WHEREFORE, this Court recommends that any appeal be scheduled and heard on an expedited basis.

/s/
DOUGLAS T. HAGUE, J.S.C.